FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-157

In The

Supreme Court of the United States

October Term, 1989

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

v.

JOHN P. CAUSEY, JR., individually and as Executor of the Estate of JOHN P. CAUSEY, SR. and as Administrator with Will Annexed of the Estate of VIRGINIA D. CAUSEY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NICHOLAS R. ALLIS*
LAW OFFICES OF NICHOLAS R. ALLIS
A LAW CORPORATION
11601 Wilshire Boulevard
Suite 1830
Los Angeles, CA 90025
(213) 477-1200

JAMES BUTLER
BUTLER, BUTLER & OSBORNE
A PROFESSIONAL CORPORATION
626 Wilshire Boulevard, Suite 914
Los Angeles, CA 90017
Attorneys for Respondents Ryder/Johns

JOHN D. ROWELL*
MARK P. ROBINSON
ROBINSON, ROBINSON & PHILLIPS
1000 Wilshire Boulevard
Suite 1950
Los Angeles, CA 90017
(213) 485-1798
Attorneys for Respondents Causey

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE PETITION SHOULD BE DENIED BECAUSE THE RULE 407 ISSUE AS DESCRIBED IN THE PETITION IS NOT PROPERLY PRESENTED BY THIS CASE..... 6

A. The Issue As Framed by Defendant Does Not Fit the Facts of This Case And Thus The Decision Below Does Not Conflict With Decisions In Other Circuits. 6

B. Rule 407 Does Not Require the Exclusion of the Hudson Report Because Any Subsequent Measures Were Offered For Other Permissible Purposes 9

C. The Issue Presented By This Case Is Not of Recurring Importance..... 10

D. Conclusion 12

II. THERE IS NO GENUINE CONFLICT IN THE CASE LAW REGARDING RULE 49(a) – EVEN IF ONE COULD BE FOUND, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLUTION 13

CONCLUSION..... 20

TABLE OF AUTHORITIES

Page

American Airlines Inc. v. United States 418 F.2d 180, 196 (5th Cir. 1969) 10

Bauman v. Volkswagenwerk 621 F.2d 230 (6th Cir. 1980) 7

Bickerstaff v. South Central Bell Telephone Co. 676 F.2d 163, 167-69 (5th Cir. 1982) 10

Cate v. Good Bros., 181 F.2d 146 (3d Cir. 1950) 15

Chan v. Korean Airlines, ___ U.S. ___, 109 S.Ct. 1676 (1989) 18, 19

Davis v. United States, 417 U.S. 333, 342, 94 S.Ct. 2298, 2303 (1974) 18

Dixon v. International Harvester Co. 754 F.2d 573, 583 (5th Cir. 1985) 7

Dixon v. Southern Pac. Transp. Co., 579 F.2d 511 (9th Cir. 1978) 19

Gullett v. St. Paul Fire & Marine Insurance Co., 446 F.2d 1100 at 1105 (7th Cir. 1971) 15, 16

In re Aircrash In Bali, Indonesia, 871 F.2d 812, 816 (9th Cir. 1989) 15, 17, 18, 19

In re Aircrash In Bali, Indonesia, 684 F.2d 1301, 1313 (9th Cir. 1982) 18

Koonce v. Quaker Safety Products & Mfg. Co., 798 F.2d 700, 7818-19 (5th Cir. 1986) 7

Lindsay v. Ohio Pharmaceutical Corp 637 F.2d 87 (2nd Cir. 1980) 7

Louisell and Mueller, Federal Evidence Rule 407 §164 p381, 1655 p395 (Vol. 2 1985) 10, 11

Lowery v. Clouse, 348 F.2d 252, 259-261 (8th Cir. 1965) 16

Millard v. Municipal Sewer Authority, 442 F.2d 539 (3d Cir. 1971) 15

1B MOORE'S FEDERAL PRACTICE ¶ 0-404[10] 18

TABLE OF AUTHORITIES – Continued

Page

Ritigan v. New York Cent. R. Co., 291 F.2d 548 (2d Cir. 1961) 14

Skidmore v. Baltimore & O.R. Co., 167 F.2d 54 (2d Cir. 1948) 14

Thedorf v. Lipsey, 237 F.2d 190 (7th Cir. 1956).....15, 16

Venieris v. Byzantine Maritime Corp., 731 F.2d 1061 (2d Cir. 1984) 14, 15

Villari v. Terminix International Inc. 692 F.Supp. 568 (D.D.Pa. 1988)..... 7

Vockie v. General Motors Corp 66 F.R.D. 57 (E.D.Pa), Aff(d) Mem. 523 F.2d 1052 (3rd Cir. 1975)..... 7

Walther v. Omaha Public Power District, 412 F.2d 1164, at 1170 (8th Cir. 1969) 16

Wolf by Wolf v. Procter & Gamble Co. 555 F.Supp. 613 (D.N.J. 1982) 7

STATEMENT OF THE CASE

On April 22, 1974, Pan American World Airways, Inc. [hereinafter "**PAN AM**"] flight 812 with Donald Zinke as pilot in command crashed into the side of a mountain on the island of Bali, killing all passengers and crew. Plaintiffs are the three minor children and widow of decedent John Ryder and the adult children of decedents Virginia and John Causey. The case went to trial for the first time in 1978. At that trial, the crew of the aircraft was found guilty of negligence, but not guilty of willful misconduct. However, the United States Court of Appeals for the Ninth Circuit found that the trial court had erred in excluding proficiency records of the pilot and crew.[1] Therefore, the Court of Appeals remanded the case for retrial with direction that the evidence be admitted on the issue of willful misconduct.

The second trial was held in 1986 and the proficiency records of Captain Zinke were presented to the jury for the first time. The jury found that **PAN AM** was guilty of willful misconduct. The proficiency records showed that Captain Zinke was often incompetent in handling his command of a passenger aircraft, particularly when presented with more than one problem at the same time. Plaintiff's expert, Donald Kemp, was Chief of Accident Investigation of the Federal Aviation Administration [FAA] at the time of the crash. He testified that he had personally analyzed proficiency records of 600 flight crew members involved in various accidents. The proficiency

---

[1] Proficiency Records are the history of a pilot's training and performance based in part on testing and simulators and "check" rides monitored by check pilots.

records of Captain Zinke were the "worst" he had ever seen.[2] Throughout his proficiency records Captain Zinke had shown an inability to follow "approach plates", as well as failure to plan ahead, simple errors in calculation leading to as much as a 500 mile miscalculation of his position on one trip, an inability to follow procedures, and constant problems in the approach and landing phase. The errors committed by Captain Zinke for years were repeated on Flight 812 and were therefore within the scope of foreseeability by competent management.

Another Plaintiffs' expert, Captain Cottle, testified in pertinent part as follows:

> "A. Yes, sir. We had available to us about eight and a half years of Mr. Zinke's training and proficiency and route checks. In that eight and a half years we have records of some 50 of those occurrences, either simulator or airplane training or a combination of route checks or report of a captain on a copilot, and even one report of a copilot on a captain.
>
> Of those 50, some 29 indicated a performance less than desired, less than normal." (May 21, 1986 RPT 186:14-187:21.)

Most dramatically, a co-pilot who flew with Captain Zinke two years before the crash wrote a lengthy letter to **PAN AM** headquarters detailing the deficiencies of Captain Zinke and concluding by stating:

---

[2] May 16, 1986 RPT 159:10-16. References are to Excerpts filed by Appellant/Defendant in the United States Court of Appeals except where "Supp. Excerpts" follows the reference in which case the reference is the Supplemental Excerpts filed by Appellees/Plaintiffs.

> "In summary it is my opinion that Captain Zinke is below standards in his performance as pilot in command. His inability to think and react as a pilot in command could result in disaster should he not have constant supervision from his first officer and engineer." [Emphasis added.] [Ex. 114, Supp. Ex. pp 376-378]

In the second trial Plaintiffs went about proving the willful misconduct by management as follows:

1. The crew had been previously found guilty of negligence in its handling of Flight 812 which proximately caused the damages found by the first jury.

2. Prior to that time, the corporate management had sufficient information regarding the lack of proficiency of Captain Zinke, and its effect on other members of a crew under his command, so as to have been able to forecast that Zinke, and/or a crew under his command, would engage in substandard conduct in the future. Therefore, Captain Zinke should have been suspended or removed from the command pilot's rolls.

3. The entrustment of a plane and passengers to Captain Zinke's command, especially on a flight which required cockpit discipline and flight precision in order to avoid problems of terrain, constituted wrongful entrustment of a plane and passengers with a conscious disregard of the safety of those passengers.

The introduction into evidence of the Thomas report tended to corroborate the contention of "conscious disregard" by showing that corporate management could have been apprised of the laxity in safety procedure which pervaded the **PAN AM** flight personnel. This report also

revealed that management's kid-glove treatment of Captain Zinke was not an aberration, but an example of long-term malaise involving management inaction in the face of ongoing pilot, and other crew, infractions and deviations from the standards of the industry.

The Thomas Report analyzed deficiencies in **PAN AM** organization and management before the crash. The Court of Appeals found that the Thomas Report was properly admitted as an admission against interest pursuant to Rule 801(d)(2)(D). The Court also found that "since the Thomas Report, a comprehensive report many months in the making, was dated only one day after the Bali crash, it is patently clear it was not a response to the crash. We find no basis for treating the Thomas Report as a subsequent remedial measure."**PAN AM** takes no issue with this ruling in its petition.

Although not as important as the proficiency records and the warning letter from a former co-pilot to management, the Hudson Report also supported plaintiffs' position. The Hudson Report was the result of an official governmental investigation of **PAN AM** by the Federal Aviation Administration [FAA] launched immediately after the Bali Crash. The report, like the Thomas Report, analyzed deficiencies in **PAN AM** management and organization before the crash. In addition, the Hudson Report focused specifically on Captain Zinke. The Hudson Report labeled Captain Zinke "substandard" and found that his record of problems was three to four (3-4) times as long as any of the other "substandard" pilots identified in the report.

Both the Hudson and Thomas Reports made recommendations for the future. These recommendations were very similar and included better identification of substandard pilots and early retirement of them. The Hudson Report also contained figures showing more early retirements in 1974 than in previous years. It was never established how many of these retirements took place before as opposed to after the Bali air crash on April 22, 1974. The recommendations and early retirements were largely irrelevant to this case. This is because other parts of the reports, which were used extensively by Plaintiffs, specifically found substandard conduct before the flight. In considerable detail, both the Thomas and Hudson reports concluded that **PAN AM**, before the Bali air crash, suffered from substandard cockpit discipline (1Exc. Rec. 258; Pet.App. at 72a-74a),[3] inadequate or improper operational control by Captains (1Exc. Rec. 258; Pet.App. at 73a-75a, 76a-78a), lack of awareness of altitude and failure to utilize altimeter properly (1Exc. Rec. 261-171; Pet.App. at 73a-75a), failure to adequately identify and supervise substandard captains (1Exc. Rec. 257; Pet.App. at 76a-78a), inadequate checkairman program (1Exc. Rec. 279-280; Pet.App. at 70a-75a), and substandard training (1Exc. Rec. 283-291; Pet.App. at 73a-79a). Plaintiffs' experts testified that the crew and Captain Zinke demonstrated on Flight 812 the problems which had been identified in the Hudson Report as endemic in the **PAN AM** flight organization. (May 16, 1986 RPT 89-92, 113-14,

---

[3] "Exc. Rec." refers to Excerpts of Record in the court of appeals; "Pet. App." refers to petitioner's appendix attached to Petition For Writ of Certiorari.

149:14-150:15, 152-165; May 21, 1986 RPT 98-104, 120-124, 172-177, 182-185; May 22, 1986 RPT 107-108; 176-184.)

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE RULE 407 ISSUE AS DESCRIBED IN THE PETITION IS NOT PROPERLY PRESENTED BY THIS CASE.

A. The Issue As Framed By Defendant Does Not Fit the Facts of This Case And Thus The Decision Below Does Not Conflict With Decisions In Other Circuits.

PAN AM'S statement of the issue when compared with the facts of this case demonstrates that the issue is not adequately presented by this case.

PAN AM'S statement of the issue is:

> "I. Whether the Federal Rules of Evidence protect remedial measures that are developed and implemented by a defendant under governmental supervision is an important question as to which the Circuits are in conflict."

The Hudson Report with its findings and recommendations was not "developed and implemented by a Defendant under governmental supervision." Instead, the Hudson Report was researched, authored and issued by the government.

All the cases from courts of appeals cited by **PAN AM** concern actions taken *not* by the government but by

Defendant.[4] Rule 407 does not require the exclusion of third party measures. See *Koonce v. Quaker Safety Products & Mfg. Co.*, 798 F.2d 700, 7818-19 (5th Cir. 1986); *Dixon v. International Harvester Co.* 754 F.2d 573, 583 (5th Cir. 1985).

In an attempt to force this case to fit within an issue **PAN AM** hopes is of interest to this Court, **PAN AM** has painstakenly searched the transcript of multiple days of testimony by Plaintiffs' experts and located several short passages referring to the statement in the Hudson Report that there were an increased number of early retirements in 1974. **PAN AM** did not establish that the early retirements were subsequent remedial measures[5] and even if they were, the evidence was unimportant.

---

[4] Moreover, some cases cited by Defendant do not focus or mention the issue framed by Defendant – voluntary versus involuntary action by a Defendant pursuant to governmental pressure. See e.g. *Bauman v. Volkswagenwerk* 621 F.2d 230 (6th Cir. 1980); *Wolf by Wolf v. Procter & Gamble Co.* 555 F.Supp. 613 (D.N.J. 1982). Some of the cases cited by Defendant do not deal with Rule 407 at all. See *Lindsay v. Ohio Pharmaceutical Corp.*, 637 F.2d 87 (2nd Cir. 1980); *Vockie v. General Motors Corp.*, 66 F.R.D. 57 (E.D.Pa), Aff(d) Mem. 523 F.2d 1052 (3rd Cir. 1975). In *Villari v. Terminix International Inc.* 692 F.Supp. 568 (D.D.Pa. 1988), relied on by Defendant, the court agreed that Rule 407 "is hardly served by excluding evidence of a party acting under compulsion." In the instant case, **PAN AM** was found to be acting under compulsion. Finally, in all the cases cited by Defendant, the evidence of subsequent remedial measures was extremely important and dramatic. That is not the case here.

[5] Defense expert Healy explained the increase number of retirements on the fact that **PAN AM** "had a lot of captains, all of the same age, that were coming up towards retirement or to earlier retirement period at about the same time." Tr. May 29, 1986 at 11-70; Resp. App. 11a.

There is no evidence as to how many, if any, of these retirements took place after as opposed to before April 22, 1974, the date of the Bali air crash. Defendant has the burden at trial to show that the evidence is a subsequent remedial measure. There was no attempt to make such a showing by **PAN AM** at the trial.

To the extent the evidence goes to show that **PAN AM** had incompetent pilots before 1974 and/or should have known of that fact, the evidence is indirect, cumulative and harmless.[6] As noted in the Statement of Facts above, Captain Zinke's proficiency records and the co-pilot's warning letter constituted the most convincing and direct evidence of his incompetence and **PAN AM'S** notice thereof. The Hudson Report and the Thomas Report both contain powerful direct evidence of the incompetence of **PAN AM'S** pilots which should have been known to management. The Hudson Report, for example, specifically identified Captain Zinke and several other pilots as substandard based on their proficiency records. The Hudson team conducted its own proficiency checks on a significant number of **PAN AM'S** pilots and found that over 38 percent of **PAN AM** pilots in command failed those checks. The Hudson Report and the Thomas Report specifically found in their investigatory findings that **PAN AM** was deficient in its failure to adequately identify substandard Captains and in other related respects set forth above at p. 5 supra. This direct

---

[6] Moreover, the negligence of Captain Zinke and the crew on Flight 812 was admitted so that to the extent such evidence tends to prove the negligence of the crew, it is irrelevant.

evidence of incompetence and notice to **PAN AM** overwhelms the circumstantial evidence of early retirements which requires several jumps in logic before it becomes relevant. The recognition that the evidence made no difference may be why **PAN AM'S** attorney chose not to object, or request a limiting instruction or redacting of that portion of the Hudson Report.

B. Rule 407 Does Not Require The Exclusion Of The Hudson Report Because Any Subsequent Measures Were Offered For Other Permissible Purposes

Parts of the Hudson Report which Defendant classifies as "remedial measures" were offered for permissible purposes. Rule 407 "does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as . . . feasibility of precautionary measures, if controverted or impeachment." Defense witnesses took the position at trial that identifying Captain Zinke as a substandard pilot and removing him as pilot in command was not feasible because of Union regulations which prevent firing pilots, and the fact that proficiency records showed Captain Zinke was competent, not incompetent. Tr. May 29, 1986, at 38-40, 46, 68-9, Resp. App. 7a-11a.

The evidence is also admissible as impeachment in the broad sense of the term because **PAN AM** argued throughout the trial that its system for training pilots was a good one and that Captain Zinke was not an incompetent pilot. Tr. May 29, 1986, at 46, 68-9; Resp. App. 10a-11a.

"If defense strategy includes assertions that all precautions had been taken, that no others would have been practicable, or even that claimant's proof distorts the conditions which prevailed at the time, then proof of subsequent measures becomes relevant for impeachment purposes and, as Rule 407 expressly recognizes, his use of proof is beyond the reach of the exclusionary provision." *Louisell and Mueller, Federal Evidence,* Rule 407 § 165 p395 (Vol. 2 1985); see *Bickerstaff v. South Central Bell Telephone Co.* 676 F.2d 163, 167-69 (5th Cir. 1982); *American Airlines Inc. v. United States* 418 F.2d 180, 196 (5th Cir. 1969).

C. The Issue Presented By This Case Is Not of Recurring Importance.

It is exceedingly rare that an investigative report prepared by a third party is the subject of objection on the grounds of Rule 407 as illustrated by the fact that Defendant has not cited any such cases from the courts of appeals. Therefore, the issue as presented by this case is not of recurring importance.

Even if this case involved a remedial measure developed and implemented by a Defendant under governmental supervision, the courts following the alleged Ninth Circuit rule are not helpless to restrict the use of such remedial measures. Rule 403 can be used to exclude proof of such subsequent remedial measures because of the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Finally, the policy basis enunciated by **PAN AM** for excluding the Hudson Report is open to serious doubt. **PAN AM** argues that potential Defendants should be able

to participate freely in accident investigations without being concerned that what is said might be used against them in later litigation. Here however, **PAN AM** had already stated essentially the same criticisms and recommendations that appeared in the Hudson Report in its own internal report, the Thomas Report, prepared before the Bali air crash. And as for the early retirements, the Thomas Report extensively discussed the need for such a program and the presence of substandard pilots in the organization. See 1Exc. Rec. 94-5. Inasmuch as the admissions had already been made by **PAN AM** in the form of the Thomas Report, there was little reason to be concerned about a repetition of them in the Hudson Report.

There are additional reasons why the policy basis as stated by **PAN AM** does not apply in this case. As noted commentators have stated:

> "There must be many persons who take subsequent remedial measures wholly unaware that there exists an evidential rule of exclusion; any person who *is* aware of such a rule is likely to know as well that the rule is easily circumvented; any person who is competently advised will know too that taking no action poses serious countervailing risks, since inaction in the face of a known danger increases the chance of liability to future claimants." Vol. 2, Louisell & Mueller *Federal Evidence* § 164 p381 (1985).

These doubts are particularly valid in the case at hand. **PAN AM'S** internal study, the Thomas Report, found that **PAN AM** had a fatality rate in 1973, the year before the Bali air crash, which was "six times the U.S. rate for fatal accidents per 100,000 flight hours". The

catastrophic consequences of inaction would have significantly increased the risk of future crashes, future liability and even the very existence of **PAN AM** as a competitive corporation. To argue that **PAN AM** would not have taken steps because of fear of civil suits by survivors of those killed is not realistic in view of these other potential problems.

D. CONCLUSION.

After 14 years of litigation, the families of those who died in the Bali air crash are entitled to see an end to this case. The evidence of early retirements and recommendations was largely superfluous to Plaintiffs' case.[7] The court of appeals properly applied an "abuse of discretion" standard as to the admissibility of the Hudson Report and upheld the exercise of discretion by the trial court. Even if some technical error may have occurred, and there has been no showing of such, it would be harmless in the context of this case because of the plethora of other, more direct, evidence on the same issue. Finally, Defendant's failure to object to evidence of early retirements or request limiting instructions or that offending parts of Hudson Report be redacted constitutes waiver and, in addition, signifies how little importance Defendant attached to early retirements or recommendations in the context of this case.

---

[7] Plaintiffs' closing argument did not mention early retirements or specify any recommendations.

II.

THERE IS NO GENUINE CONFLICT IN THE CASE LAW REGARDING RULE 49(a) – EVEN IF ONE COULD BE FOUND, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLUTION

PAN AM has suggested that there is a conflict in authority in the circuits which this court should resolve. The conflict, according to **PAN AM,** concerns the interpretation of the following portion of Federal Rule of Civil Procedure 49(a):

> "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. . . . The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."

PAN AM asserts that in the Seventh, Second, Third and Eighth Circuits, the aforesaid portion of Rule 49(a) mandates reversal when the trial court accurately but unnecessarily advises the jury of the legal effect of its findings. On the other hand, according to **PAN AM,** the Fifth and Ninth Circuits hold that the discretion conferred by Rule 49(a) is extremely broad and that advising the jury of the legal effect of its findings is appropriate, even when unnecessary.

In point of fact, although at first blush the language quoted by **PAN AM** may seem to be in conflict, the *holdings* in the different circuits are *not* diverse. Moreover, PAN AM has cited to no holding in any circuit which applied its view of the law, i.e. where a trial court was reversed because it explained the legal effect of the jury's

resolution of either special verdicts or special interrogatories.

All of the decisions cited by **PAN AM** agree that Rule 49(a) leaves the discretion to advise or not advise to the trial court. However, Rule 49(a) purports to state the circumstances under which the trial court has a *duty* to advise the jury. Its language does not prohibit or purport to limit the trial court's discretion to advise the jury. This distinction is significant, is noted in one decision relied upon by **PAN AM** and explains much of the perceived "conflict" in circuit authority.

The perceived conflict in the circuits is likewise not as clear as **PAN AM** suggests.

The decisions in the Second Circuit relied upon by **PAN AM** are not inconsistent with the result in this case. In *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54 (2d Cir. 1948), the court of appeals was dealing with a claim that the trial court had erred when it refused to give special verdicts. The court of appeals held the trial court had virtually unlimited discretion under Federal Rule of Civil Procedure 49(a) to employ a general verdict and engaged in a lengthy discussion of the relative merits of general versus special verdicts which included the *dicta* quoted by **PAN AM**. The holding in *Skidmore*, supra, had nothing to do with the issues presented by this Petition. The Second Circuit in *Ritigan v. New York Cent. R. Co.*, 291 F.2d 548 (2d Cir. 1961) did not have the question of the proper exercise of discretion under Rule 49(a) before it and the quoted language was mere *obiter dicta*, not relied upon in any other Second Circuit decision. In its more recent discussion of this issue in *Venieris v. Byzantine Maritime*

Corp., 731 F.2d 1061 (2d Cir. 1984) the Second Circuit acknowledges the judicial and scholarly criticism of the earlier language relied upon by **PAN AM**. As pointed out in *In re Aircrash in Bali, Indonesia*, 871 F.2d 812 at 815 (9th Cir. 1989) (*Bali II*) *Venieris*, supra, is entirely consistent with the reasoning and the result in this case.

Nor are the Third Circuit decisions relied upon by **PAN AM** inconsistent with the holding in this case. *Millard v. Municipal Sewer Authority*, 442 F.2d 539 (3d Cir. 1971) involved the contention that the trial court had abused its discretion by *not* telling the jury what limitations existed on third party liability. The question of the extent of the court's *discretion* to advise the jury was never addressed. Likewise, in *Cate v. Good Bros.*, 181 F.2d 146 (3d Cir. 1950) the trial court submitted special interrogatories. The appellant argued that the interrogatories did not direct the jury's attention to the existence and duty to mitigate damages. The court of appeals rejected this contention finding no abuse of discretion by the trial court since the information was not "required" by the jury.

The Seventh Circuit decisions relied on by **PAN AM** are also consistent with the result in this case. *Thedorf v. Lipsey*, 237 F.2d 190 (7th Cir. 1956) did *not* involve a contention that the trial court had abused its discretion by advising the jury of the legal effect of the special verdicts. Rather, the plaintiff argued that the trial court committed reversible error when it *refused* to advise the jury of the legal effect of its findings. The court of appeals found no error in the trial court's exercise of its discretion. As pointed out in *Gullett v. St. Paul Fire & Marine*

Insurance Co., 446 F.2d 1100 at 1105 (7th Cir. 1971)[8], *Thedorf*, supra, says little or nothing concerning the situation at bar, i.e. where a party claims the jury was improperly advised of the legal effect of its special verdicts. After distinguishing *Thedorf*, supra, the Seventh Circuit in *Gullett*, supra, held that counsel's explanation of the legal effect of the Special Verdicts was not reversible error. (*Gullett*, supra, 1105).

Finally, in *Walther v. Omaha Public Power District*, 412 F.2d 1164, at 1170 (8th Cir. 1969) the Eighth Circuit rejected the appellant's contention that the trial court committed error when it instructed the jury of the legal effect of its findings. Thus, *Walther* appears to be entirely consistent with the decision in this case. In *Lowery v. Clouse*, 348 F.2d 252, 259-261 (8th Cir. 1965) the court of appeals refused to adopt the interpretation of Rule 49(a) suggested by **PAN AM**.

The lack of any holding by a court of appeals that informing a jury of the legal effect of its findings is reversible error is not surprising in light of the language from Rule 49(a) referred to above which speaks only of when a court "shall give" explanations or instructions concerning findings.

As is demonstrated by the discussion above, the holdings of the courts of appeal are not in conflict even though certain decisions employ language in support of their results which conflicts with language contained in other court of appeals decisions.

---

[8] *Gullett* is the only other Seventh Circuit case cited by **PAN AM**.

Another reason certiorari should not be granted on the Rule 49(a) issue is simply that the Ninth Cirucuit decision in *Bali II* is completely consistent with either of the supposedly conflicting views of Rule 49(a). In other words, the Ninth Circuit in *Bali II*, supra, at 815, applied the more limited "unless necessary" rule suggested by **PAN AM**.

The Ninth Circuit held that the intitial advice to the jury that a finding of wilful misconduct would avoid the Warsaw damage limitations and the subsequent instruction to the same effect[9] were not error because the jury "had to be informed about the limitation" and absent such information "would have deduced a connection on its own and it might have been erroneous." *Bali II*, supra, 815.

Thus the court of appeals actually grounded its decision upon a determination that the instructions and advice given to the jury in this case were reasonably necessary in light of the evidence presented and the potential for jury confusion. *Bali II*, supra, 815. All circuits appear to agree that, in such a circumstance, advising the jury of the legal effects of its findings is appropriate.

The court's advice and instructions with respect to the effect of the verdict were meant to prevent confusion and/or possible misinterpretation of the language contained in the Warsaw notices. *Bali II*, supra, 815. At the trial level the judge determined that the jury would be required, under the law of the case, to decide the issues of

---

[9] June 3, 1986 RPT 21:13-22:1.

adequacy of notice and delivery with respect to the Warsaw convention.[10] In its Petition **PAN AM** does not take issue with this conclusion by the court of appeals. Rather, **PAN AM** attempts to circumvent this holding by arguing that the issue of adequacy of notice should never have been presented to the jury. Thus, the argument proceeds, the jury would never have the Treaty before it and could not be confused.

PAN AM relies upon *Chan v. Korean Airlines*, ___U.S. ___, 109 S.Ct. 1676 (1989) for the proposition that inadequacy of notice cannot be the basis for avoiding the Warsaw damage limitations. *Chan* was decided after *Bali II* was filed[11] and the appellate decision in *Bali II* was *not* based upon any inadequacy of notice or delivery. Instead, the court of appeals upheld the judgment because **PAN AM** had been found to have engaged in wilful misconduct. Such a holding is entirely consistent with *Chan*, supra.

---

[10] *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301 at 1313 (9th Cir. 1982) (*Bali I*):

> "On remand, **PAN AM** will be required to prove ticket delivery and adequate notice before the Warsaw limitation could be applied."

[11] A trial court and a court of appeals are not required to comply with the rule of the law of the case where there has been some intervening change in the factual context or there has been an intervening change in the law applicable. *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[10]; *Davis v. United States*, 417 U.S. 333, 342, 94 S.Ct. 2298, 2303 (1974). In this particular unique situation, there had been no change in factual context nor any change in applicable law when *Bali II* was filed.

Moreover, **PAN AM** chooses to ignore the fact that the *Chan* decision requires the carrier to prove that it properly *delivered* a ticket. *Chan*, supra, 1680. ***PAN AM introduced the tickets and moved for their admission.*** (May 14, 1986 RPT 19:12-20:5; May 15, 1986 RPT 212:19-213:11.) **PAN AM** also moved for admission of the text of the CAB regulations. (May 30, 1986 RPT 119:5-121:16.) Both of these exhibits contained a number of references to the dollar amount of the limitations if Warsaw were found applicable. (*See* Appendix to Petition, pp. 113a-118a, Appendix to Response, pp. 1a-4a.) As pointed out in *Bali II*, supra, at 815, the jury was advised of the effect of a finding of wilful misconduct in order to avoid the potential that they would jump to an erroneous conclusion as to the effect of their findings. Although not noted by the Ninth Circuit, one concern expressed below was that the jury might misconstrue the wilful misconduct finding as one for punitive damages.[12] (June 3, 1986 RPT 21:13-22:1.)

No prejudice has been or could be shown to have resulted from the court's informing the jury of the fact that a finding of wilful misconduct would avoid application of the Warsaw limitations. See, *Dixon v. Southern Pac. Transp. Co.*, 579 F.2d 511 (9th Cir. 1978). **PAN AM** speculates that the jury returned a verdict based not upon the facts, but upon emotion. There is nothing in the record which would support such a conclusion. Indeed, the fact that the jury found for **PAN AM** on the question of

---

[12] Additionally, counsel for **PAN AM** appeared to argue that a finding of wilful misconduct would not result in any monetary effect on **PAN AM**. June 3, 1984 RPT 134.

whether the captain or crew had comitted wilful misconduct and also found for **PAN AM** on the issue of adequacy of notice and delivery,[13] supports the conclusion that the jury reached its verdicts based upon the evidence presented.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

NICHOLAS R. ALLIS*
LAW OFFICES OF NICHOLAS R. ALLIS
A LAW CORPORATION
11601 Wilshire Boulevard
Suite 1830
Los Angeles, CA 90025
(213) 477-1200

JAMES BUTLER
BUTLER, BUTLER & OSBORNE
A PROFESSIONAL CORPORATION
626 Wilshire Boulevard, Suite 914
Los Angeles, CA 90017
Attorneys for Respondents Ryder/Johns

JOHN D. ROWELL*
MARK P. ROBINSON
ROBINSON, ROBINSON & PHILLIPS
1000 Wilshire Boulevard
Suite 1950
Los Angeles, CA 90017
(213) 485-1798
Attorneys for Respondents Causey

*Counsel of Record

[13] See Appendix to Petition, pp. 62a-64a.

Excerpt from Exhibits 317, 318, 319, 320, 323-A and 323-B

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers, parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. The limit of liability of U.S. $75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. $58,000 exclusive of legal fees and costs. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000. The names of carriers, parties to such special contracts, are available at all ticket offices of such carriers and may be examined on request. Additional protection can usually be obtained by purchasing insurance from a private company. Such

insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

Excerpt from Exhibit 328

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of Qantas Airways Limited and certain other carriers parties to such special contracts, for death of or personal injury to passengers, is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $9,000 or U.S. $18,000.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special

contracts of carriage. For further information please consult your airline or insurance company representative.

Note. The limit of liability of U.S. $75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. $58,000 exclusive of legal fees and costs.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DAVID W. WILLIAMS,
SENIOR JUDGE PRESIDING

IN RE: AIR CRASH IN BALI, INDONESIA, ON APRIL 22, 1974	NOS.: 70-3341 78-3761 78-3762 78-3763
JOHN P. CAUSEY, JR., ETC., ET AL., PLAINTIFFS, VS. PAN AMERICAN WORLD AIRWAYS, INC., ETC., DEFENDANTS.	MDL NO. 215 NOS. CV 75-1364-DWW CV 76-1120-DWW CV 75-3293-DWW
SIMONE RYDER, ETC., ET AL., PLAINTIFFS, VS. PAN AMERICAN WORLD AIRWAYS, INC., ETC., DEFENDANTS.	VOLUME 11

MARGARET G. JOHNS, ETC., ET AL.,
PLAINTIFFS,
VS.
PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
WEDNESDAY, MAY 28, 1986

SUSAN A. LEE, CSR 2800, CM, RPR
OFFICIAL COURT REPORTER
435 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 626-6353

TESTIMONY OF DEFENDANT'S
EXPERT KENNETH HEALY

(p. 11-34) Q Let me ask you this about those reports: In your opinion, did these reports conclude in any fashion that the Pan Am management was guilty of reckless misconduct?

A No.

Q Did these reports conclude that Pan American had a disregard of safety?

A No.

Q Do you believe that these reports concluded, using their words, however, accepting them as they are, that they had – that Pan Am, in training and evaluation, had fallen below Federal Aviation Administration standards?

A No.

Q Did these reports conclude that Pan Am had fallen below average airline standards, if those standards are somehow different than the F.A.A. standards?

A No. There are no words like that in there.

* * *

(p. 11-38) The Witness: Almost all airlines, at least up until deregulation here a few years ago, had union contracts which went into every phase of how a pilot or crew member could be handled. They – the contracts which were negotiated – and those are, in the case of airlines, are negotiated not only under the rules of the N.L.R.B., the National Labor Relations Board, but also – and I never particularly liked this, but also under the Railway Labor Act.

That's a long story and doesn't fit in here though, I'm sure.

They – when the contract is finally agreed to and ratified, it becomes, in essence, law, and how you will treat a man. It covers his scheduling, his training. You can't even give a man extra training without agreeing with the union on what it will be and how much it will be.

And then, in most cases, they want the man to be paid for that. I'm sure that when you to off to a seminar somewhere to improve your proficiency and learn new things in law, you would like to be paid for that too, and I'm sure you're not. But the pilot is. If he needs some extra training, in most cases – and in Pan Am that was certainly true – he got paid for that extra training.

Say, if the man is, for whatever reason – for (p. 11-39) Instance, it will go to the extent that if he fails his – he's come up for upgrading, he's been a first officer and come up for upgrading to captain, and you do not think he's progressing properly, you can't just drop him. The union will insist on extra training.

You give him the extra training, and he's still not up to what you want to accept. You then have to put him back to his previous position. And after x number of time, whatever is set forth in the contract – it's usually a period of so many months and so many hours of flying – if there's an opening for upgrading, the man can bid it again, and you train him again.

By Mr. Winters:

Q Let me ask you this: Does the airline decide who gets to bid from first officer to captain?

A Negative. Negative. That is strictly seniority as set forth by the union.

Q Does the airline get to decide which captain gets to fly which piece of equipment, a 707 or 747?

A No, No. That is, again, bid by seniority and by contract.

Q Does the airline get to decide which guy gets to fly which route?

A No, No. That is – you have bids for the – usually posted a month ahead of time, bids of lines of flying; and by seniority, they bid those.

Q Let me ask you this: You've reviewed captain Don Zinke's (p. 11-40) training records, have you not?

A Yes.

Q In 1967, sir, will you agree with me that he was in a precommand program and did poorly?

A Yes.

Q That is correct?

A Yes.

Q And he was dropped from that program?

A Yes.

Q And in 1968, he was allowed to reenter the program?

A Yes.

Q Do you believe that management decision to allow him to reenter the program was an appropriate one?

A Yes.

Q Why is that?

A Because it was in conformance with the contract and the bidding rules.

Q He was elevated to captain after a check ride in 1968, and Pan Am allowed him to captain 707 flights. Do you believe that decision in 1968 was appropriate?

A Yes. I have no reason to think otherwise.

Q You've reviewed the butler letter and Mr. Butler's testimony; is that correct?

A Yes.

Q And have also reviewed documentation as to Pan Am's

* * *

(p. 11-46) Do you believe that Pan Am's decision to entrust this plane to this crew, of which one of its five-man members was Mr. Zinke, do you believe they were justified, given their rules, the union rules, the F.A.A. standards, in allowing him to be a part of that crew?

A Yes.

Q Why is that, sir?

A I see nothing there that would justify them in removing him. He had certainly – as we stated earlier, he had some trouble in his precheckout training as a younger first officer, but his history, as we go through his records, shows a general betterment. And in the last three checks, as I remember, prior to that January line check, they were all satisfactory, and two of the three were monitored by F.A.A. personnel.

* * *

(p. 11-63) Q No, Sir. Do you remember that the Hudson Report said that, in summary, the team believes that Pan American has not had an effective check airman program, and thus numerous substandard airmen have been approved to continue in line operation? Do you remember that conclusion of the Hudson Report?

A Yes, I do, and I have a question on it. Those check airmen could not be operating as check airmen without the approval of the F.A.A. and why did the F.A.A. approve them if they were not satisfactory?

* * *

(p.11-68) Q Now, also, you said that you found, before ever reading the Hudson Report and seeing some of the missing records in the summary there, that Captain Zinke

was competent and should have been promoted to captain and should have been kept in captain's position, right? That was what your position was last fall?

(p. 11-69) A The record indicates that to me, and all I have is the record, just going on that record.

* * *

(p. 11-70) Q All Right. And did you also read that the number of these early retirements had risen from five in 1971-72 to 15 in 73 and over 40 in 1974, Paren, "Pan Am does not wish to release the exact figures to the team," end Paren? Did you read that?

A Yes, I read that, but I wondered at the time if there weren't some more factors that should have gone into understanding that properly, because among other things, Pan Am had a lot of captains, all of the same age, that were coming up towards retirement or to earlier retirement period at about the same time. This was a big problem to them, and that could have been a factor. There could have been a number of other things. I do not – I do not say that –

Q This is early retirement?

A – The figures are wrong. I'm just saying that I question it.

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DAVID W. WILLIAMS,
SENIOR JUDGE PRESIDING

IN RE: AIR CRASH IN BALI, INDONESIA, ON APRIL 22, 1974	NOS.: 70-3341 78-3761 78-3762 78-3763
JOHN P. CAUSEY, JR., ETC., ET AL., PLAINTIFFS, VS. PAN AMERICAN WORLD AIRWAYS, INC., ETC., DEFENDANTS.	MDL NO. 215 NOS. CV 75-1364-DWW CV 76-1120-DWW CV 75-3293-DWW
SIMONE RYDER, ETC., ET AL., PLAINTIFFS, VS. PAN AMERICAN WORLD AIRWAYS, INC., ETC., DEFENDANTS.	VOLUME 12

MARGARET G. JOHNS, ETC., ET AL.,
PLAINTIFFS,
VS.
PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
FRIDAY, MAY 30, 1986

SUSAN A. LEE, CSR 2800, CM, RPR
OFFICIAL COURT REPORTER
435 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 626-6353

(p. 12-108) The Court: Well, let's talk about exhibits first. The defendant has certain objections to certain of plaintiffs' exhibits. I have a list of them here. I think the best thing to do is to start with the two reports, the Thomas report and the Hudson report. That's 35 and 36.

We certainly have heard lots about those reports to this jury, and I feel in my own mind that they ought to come in, but I will listen to the objections that the defendant has concerning them.

I think that – (pause.) I think certainly the Hudson report should come in under 803 sub (8), as an official government report, and the Thomas report seems to find some support in 801(d)(2).

Let me hear what the defendant has to say about it.

(p. 12-109) Mr. Winters: Well, your honor, I filed a motion in Limine previously, setting forth at length my objections to both these, and I'd like to incorporate those and not have to put them on the record again, if that would be appropriate.

The Court: Yes. I have read them.

Mr. Winters: And I believe, your honor ruled previously that at least the Hudson report come in. I renew my objections and I have no further argument in regard to the Hudson report.

With regard to the Thomas report, I assert again those objections. I state that I object to the report as not authentic, as there can be no foundation for it, violative of the best evidence rule, and I add those to my objections previously stated.

Your honor ruled in response to my motion in limine several weeks ago that it could be referred to by experts only. It was referred to by experts. In fact, it seems like the way it went was the expert would read the report to the jury or it would be read to them. I continue to assert my objections.

* * *